IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

VS.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLEE

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,

Attorneys for Appellee.
1201 Mathieson Building,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland has not been officially reported. It is printed in the Record (R. 35-44) and reported in 95 A. (2d) 286. The opinion of the Superior Court of Baltimore City has not been officially reported. It is printed in the Record (R. 15-33).

JURISDICTION

Appellee adopts the Statement of Jurisdiction appearing at page 1 of Appellant's Brief.

THE QUESTION PRESENTED

Where an Out-of-State Vendor Sells to Maryland Purchasers Goods Which Are Used by the Purchasers in Maryland, May the State Require Collection by the Vendor of Use Taxes on Goods so Purchased Where the Vendor Delivers some of the Goods to Points in Maryland, Either in its Own Trucks or by Common Carrier at the Vendor's Expense, and also Advertises in Maryland by Newspapers Circulated there, by Broadcasts Heard there, and by Mail Addressed to Maryland Residents?

STATUTES INVOLVED

Appellee adopts the Statement of Statutes Involved appearing at page 2 of Appellant's Brief, with the following addition: Article 81, Section 370 of the Annotated Code of Maryland (1951 Ed.) sets forth exemptions from the Maryland Use Tax Act. Subsection (d) thereof exempts:

> "Tangible personal property upon the sale of which or upon the gross receipts received from the sale of which an excise tax equal to or greater than that hereby levied has been imposed under the laws of any State or territory, of the United States of America, or any political subdivision thereof, or the District of Columbia. If the tax paid to such other State or territory of the United States of America, or any political subdivision thereof, or the District of Columbia is less than that imposed by this sub-title, the difference between the tax so paid and that imposed by this sub-title shall be paid to the Comptroller."

STATEMENT OF THE CASE

Appellee adopts the Statement of the Case appearing at page 3 of Appellant's Brief, with the following addition:

(1) Deliveries by motor vehicles owned and operated by Appellant were of property sold for at least $8,000 (R. 12);

(2) Deliveries by common carrier, the charges being borne by Appellant, were of property sold for at least $1,500 (R. 13); and

(3) Deliveries to the purchaser in Wilmington were of property sold for at least $2,500 (R. 12).

THE PROCEEDINGS BELOW

Appellee adopts the Statement of the Proceedings Below appearing at page 4 of Appellant's Brief.

SUMMARY OF ARGUMENT

The duty placed on Appellant, under Maryland law, to collect use taxes on goods sold by it to Maryland purchasers does not offend the commerce clause. The statute involved in no way, either in theory or practice, operates to benefit local vendors at the expense of vendors such as Appellant, since every local vendor must perform the same duty. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33; *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359. Delivery, the incident upon which the statute rests the requirement, is local, not interstate in character. *McGoldrick v. Berwind-White Coal Mining Co., supra.* The duty to act as the State's tax collector has several times been deemed one a State may exact even of vendors engaged solely in interstate

commerce. *General Trading Co. v. State Tax Comm. of Iowa,* 322 U. S. 335; *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62.

Nor does the statute, as applied to Appellant, infringe in any way the due process clause. The delivery of goods in vehicles of Appellant in Maryland provides an abundantly sufficient contact with the State to justify requirement of a function so intimately associated with the actions comprising the contact as collection of use tax on the goods delivered. *International Shoe Co. v. Washington,* 326 U. S. 310; *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33. The deliveries by common carrier, since the charges were exclusively borne by Appellant, similarly were a contact with the State sufficient to support the exaction as to goods so delivered. Even were deliveries by common carrier to be classified, together with deliveries to the purchasers at Appellant's store in Wilmington, Delaware, as activities wholly without the State of Maryland, still the sales concerned were part of Appellant's overall Maryland business. As such, the contacts with Maryland clearly established in cases of deliveries in Appellant's own trucks suffice to require collection of the use taxes on all sales to Maryland purchasers. *Nelson v. Sears, Roebuck & Co.,* 312 U. S. 359; *Nelson v. Montgomery Ward & Co., Inc.,* 312 U. S. 373. Independently, Appellant's contacts with Maryland through newspaper, radio, television and mail advertising circulated there were sufficient to sustain the demand that use taxes be collected on goods delivered outside the State. *Nelson v. Montgomery Ward & Co., Inc., supra.*

ARGUMENT

I.

Requirement by a State that a Vendor Collect from the Purchaser Use Taxes on the Property Sold is not a Violation of the Commerce Clause of the Federal Constitution Although the Sale is one in Interstate Commerce, and this is so even if the Vendor's Activities are Solely Interstate Commerce.

Verbally, the difference between the parties to this litigation is brought into clear focus by the insistence upon the use of different language by the two to describe the imposition of which Appellant complains. Appellant asserts that a use tax is directly levied on it. Appellee, just as forcefully, maintains that it seeks not to tax Appellant but only to enforce Appellant's duty under the Maryland Use Tax statute to collect the tax from the actual users, the Maryland purchasers from Appellant. For the benefit of this Honorable Court, it may be well to recite briefly the actual manner in which the Maryland Use Tax Act impinges upon Appellant, so that it may decide for itself which characterization more accurately meets the circumstances. Under Section 369 of Article 81 of the Annotated Code of Maryland (set out at page 35 of Appellant's Brief and Appendix), the use tax is imposed upon the purchaser. By Section 371 of Article 81 (page 36 of Appellant's Brief and Appendix), a vendor engaged in business in Maryland is required to collect the tax from the purchaser, on behalf of the State. Where the vendor complies with this statutory duty, there is no imposition on it. The expenses of acting as the State's collector are compensated by reason of Section 384 of Article 81 (page 39 of Appellant's Brief and Appendix), which authorizes the vendor to retain

three percent of all taxes collected. Only in such a case as the present one, where the vendor fails to collect the tax, does it feel any imposition of the tax. In such a case, the statute requires the vendor to furnish the amount of the tax not collected, not on the theory that it is then the taxpayer, but rather as a penalty for failure to perform the statutory duty.

The Maryland statute clearly imposed the duty of tax collection upon the present Appellant for, by Section 371 of Article 81 (page 36 of Appellant's Brief and Appendix), collection is required of "[e]very vendor engaged in business in this State". By Section 368 (page 35 of Appellant's Brief and Appendix), "engaged in business in this State" is defined to include, *inter alia*, "[t]he having of any representative * * * operating in this State for the purpose of * * * delivering * * * any tangible personal property". It, therefore, is only on constitutional grounds that Appellant can rely, and it is because its chances of successful constitutional attack rest so heavily upon cases dealing with taxes directly imposed on instrumentalities of interstate commerce that it insists so vehemently on the description of Maryland's imposition as a tax directly on it. If, as the State of Maryland believes, its description of the imposition as the requirement of the collection of a tax from another more accurately covers the situation, little or no support can be found by Appellant for its contentions in the principles of constitutional law developed and enunciated by this Honorable Court.

Like the analogous immunity from State interference accorded to instrumentalities of the Federal Government, that for instrumentalities of interstate commerce was at first given a very broad scope. Before the Twentieth Century culmination of the Industrial Revolution did so much

to replace strong local prejudice with a sense of single national community, closely linked by rapid and inexpensive communication devices, the principle developed that all State taxes on instrumentalities of interstate commerce were *ipso facto* burdens and, therefore, bad, even though local commerce was equally subjected to the burdens and though, in actual application, there were no possibilities of discrimination in favor of local against interstate commerce. Thus, decisions were hammered out, and firmly welded by the doctrine of *stare decisis*, that forbade, and presumably still forbid, the direct imposition by a State of a tax on the privilege of doing business where the business involved is solely interstate commerce. E. g. *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602.

Under the economic circumstances at the time the leading cases were developed, it was no doubt a desirable constitutional interpretation which would foster interstate commerce even at the expense of local commerce. Since the time of these decisions, however, the economic objectives underlying the decisions have been largely accomplished, and this Court has come to realize the inequity inherent in freeing interstate commerce from obligations which competing local commerce must assume. Thus, in recent years, the Court has several times announced that it is not the purpose of the interstate commerce clause to foster discrimination in favor of interstate commerce. See *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 46; *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 349. In the present case, it is manifest that, were Appellant's contentions adopted, a discrimination against Maryland vendors would surely result. If Appellant can sell in the Maryland market without collecting use taxes, it enjoys an obvious competitive advantage

over those vendors who must collect. Indeed, this Court, in accordance with economic verities, no longer regards the American economy as comprised of two antagonistic and competing systems, local commerce on one hand, and interstate commerce on the other. Rather, it now realizes that the two together combine to form an integrated economic pattern.

In order to keep its decisions in harmony with the economic developments which have so transformed the American scene, this Honorable Court has discarded the earlier approach of blanket invalidation of all State regulation, in favor of a technique which permits, to the greatest extent compatible with preservation of the desirable factor of continuity through *stare decisis*, State regulation demonstrably not violating the fundamental objectives of the commerce clause. A most similar and corresponding treatment for the exemption from State regulation of instrumentalities of the United States has developed. Compare *Alabama v. King & Boozer*, 314 U. S. 1. Limited, to a considerable extent, by the fully developed line of cases prohibiting taxes directly upon instrumentalities of interstate commerce, the Court has built two avenues of departure from those authorities so that it can uphold statutes which impose upon interstate commerce its rightful and non-discriminatory portion of the obligations of our present highly developed, closely integrated, commercial and industrial system.

The facts of the present case not only logically fit both avenues of escape, but, in addition, present a situation indistinguishable from prior cases in which those two avenues have in fact been employed.

The first such avenue is the upholding of statutes which place obligations upon instrumentalities of interstate commerce where the precise incident of taxation is local rather than interstate in character. See *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80. The leading case employing this device is *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33. That case upheld a sales tax upon an interstate transaction and the requirement of collection of that tax by an interstate vendor because an incident of taxation was the delivery in the taxing State, an act characterized as local. In the present controversy, it is that very local incident, delivery, to which is attached the duty the State of Maryland imposes on Appellant. The duty is identical to that involved in the *Berwind-White* case. Appellant, faced with the obvious necessity of distinguishing that case, seeks to do so on the grounds that, while the Court's opinion speaks merely of delivery as the incident, in fact a great deal more is required, and points to other local aspects present in that case, such as the maintenance of an office by the vendor in the taxing State. We respectfully submit, however, that such a distinction on quantitative grounds is not correct. In the case of *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, this Court sustained a use tax on property constantly employed in interstate commerce except during the fragment of time between one such employment and another. The property was purchased in an interstate sale, was delivered to the purchaser in interstate commerce and immediately upon receipt was employed by the purchaser in interstate activities. The Court found the moment of rest between delivery and application a sufficient local incident to sustain the tax. Compare *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, where delivery activities of a similar magnitude with Appellant's

were assumed to be a sufficient local incident to support a non-discriminatory State tax.

Rather, the basis for limiting the "local incident" technique for sustaining State statutes is that suggested in *Nippert v. Richmond*, 327 U. S. 416. As is there pointed out, an ingenious draftsman can always find a local incident on which to base his tax or other obligation, but his success will depend upon whether the statute he draws operates in such a way that its effect upon interstate commerce is in no way detrimental as compared with its effect upon local commerce.

In the present case, there is no question of discrimination in favor of the Maryland merchants with whom Appellant is in competition. Every Maryland merchant, by the terms of the Retail Sales and Use Tax Acts, must act as the State tax collector either of a use tax, or of a sales tax, equal in amount to the tax required to be collected by Appellant. See *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, at page 364:

> "Nor is the mode of enforcing the tax on the privileges of these Iowa transactions any discrimination against interstate commerce. As we have seen, the use tax and the sales tax are complementary. Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where 'equality is its theme'."

In view of the credit provisions of Section 370(d) of Article 81 of the Annotated Code of Maryland (1951 Edition) (see Statement of Statutes Involved, at page 2 hereof), there is no possibility of discrimination by reason of multiple state taxation.

Nor can it be said that on any absolute standard, regardless of comparison with local merchants, the imposition of the duty to collect the Maryland use taxes burdens interstate commerce. This follows inevitably from the decisions in *Henneford v. Silas Mason Co.*, 300 U. S. 577, and *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, which sustain use taxes on goods sold and transported in interstate commerce. Appellant acknowledges the validity of the use tax on the property sold by it to Maryland residents but claims, nevertheless, that requirement of collection by it burdens interstate commerce. However, the effect on interstate commerce is altogether identical whether the tax collecting duty is placed upon a local or upon a non-local vendor. In either event, the cost in the market place is the same. In *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, it was held that a vendor located and doing business in a State imposing a use tax could constitutionally be required to collect use tax on goods sold by it even though the sale was one in interstate commerce. The holding in that case was extended to a wholly non-local vendor in *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335.

Indeed, upon sober reflection, the conclusion is inescapable that, while Appellant casts its argument in terms of a plea *against* burdening interstate commerce, the result it seeks would inevitably create a burden on such commerce. There are numerous Maryland vendors, engaging in interstate commerce, who must act as collectors of use tax in connection with interstate sales. To cite but one obvious example, there are mail order houses operating retail outlets in Maryland which, in view of the decisions in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373, collect Maryland use tax on orders sent by Maryland residents to

their places of business outside the State and filled by mail or common carrier from places outside the State. If Appellant can, in effect, enjoy a two percent price margin advantage over these mail order houses on every sale it makes in the Maryland market, the interstate commerce carried on by the mail order houses is unfairly burdened by the existence of such a discriminiation.

Thus, there is every reason and adequate authority for employing the "local incident" avenue in the present case to affirm the decision of the court below. It should be noted that this avenue is open even if Appellant's characterization of Maryland's imposition as a direct tax on it is accepted. Compare *Southern Pacific Co. v. Gallagher*, 306 U. S. 167.

The other avenue developed by this Court for avoiding the verbally logical consequences of the cases which forbid a non-discriminatory tax directly on instrumentalities of interstate commerce is the recognition that impositions other than taxes should each be individually scrutinized to determine whether they, in fact, create an onus of the sort intended to be discouraged by the commerce clause. As to them, this Honorable Court has refused to adopt a *per se* rule such as the one which makes all taxes automatically burdens on interstate commerce. As an illustration of what is meant, it has been consistently ruled that the mere solicitation of orders by traveling salesmen, where the orders must be accepted at the home office outside the State, is interstate commerce. See, e.g. *Norton Co. v. Department of Revenue*, 340 U. S. 534, 537. Taxes levied on the privilege of conducting such activities have been regularly struck down. The cases doing so are collected in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S.

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33, 56, footnote 11. Cf. *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U. S. 389. Nevertheless, companies selling by use of such agents have been held to be subject to a requirement that they collect use taxes for the State in which the salesmen operate. *General Trading Co. v. State Tax Comm. of Iowa,* 322 U. S. 335; *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62.

This Court in those cases examined the tax collecting onus and determined that it was not of sufficient stature to justify classification as a burden on interstate commerce. It is interesting to note that in the analogous field of State statutory impingement upon Federal instrumentalities, it has been held that a State may require a national bank to collect from its depositors a tax which would have been unconstitutional had it been levied against the bank itself. *Colorado National Bank of Denver v. Bedford,* 310 U. S. 41. It is significant that the Court was influenced by the provision in the State statute for compensation to the bank for its collecting activities, amounting to three percent of all collections. An identical provision is contained in Section 384 of Article 81 of the Annotated Code of Maryland (1951 Edition) (Appellant's Brief and Appendix page 39).

In the present case, even if, despite the holding in *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, delivery in Appellant's trucks to the homes and places of business of the Maryland purchasers were deemed activities purely interstate in character, still the principles of *General Trading Co. v. State Tax Comm. of Iowa,* 322 U. S. 335, would surely validate Maryland's imposition of the tax collecting duty, at least with respect to goods delivered in Appellant's own vehicles. There, the vendor's only activity in the State was solicitation through salesmen of orders forwarded out of the State for acceptance. To im-

pose the tax collecting duty with relation to the delivery of the very goods to which the tax applies certainly creates no greater onus than to rest the tax collecting duty upon generalized solicitation in the State. This is especially true where combined with the delivery are substantial acts of generalized solicitation through advertising by radio, television, newspaper and the mails. In *Nelson v. Montgomery Ward & Co. Inc.*, 312 U. S. 373, it was held that advertising in a State was of itself a sufficient activity to support the imposition of the use tax collecting duty with respect to interstate sales in which delivery was accomplished by mailing from a point outside the State. Certainly, no basis of distinction, constitutional in stature, can lie in the fact that the newspapers carrying the advertisements were published in Delaware, or that the radio and television broadcasts emanated from stations in Delaware, or that the mail advertising was posted in Delaware. The impact from such media derives from the circulation, not from the act of publishing, broadcasting or mailing. The circulation in Maryland was substantial and intended.

In so far as collection of the tax on goods delivered by common carrier is concerned, we, like the Appellant, fail to see any basis of distinction of a constitutional sort, whether goods are delivered in the vehicles owned by Appellant or whether delivery occurs through resort to a common carrier whose charges are borne by Appellant. On pages 23 and 24 of Appellant's Brief, it is argued that the constitutional result should be the same in either case. In this, at least, we heartily concur.

But, in any event, it is not necessary that we satisfy the Court of the substantial identity of the two situations. Let us assume that there is a difference. Let us further assume that it would be unconstitutional to require collection of

the tax if the only activity in Maryland by Appellant were delivery by a common carrier. Even so, in this particular case, imposition of the duty with respect to goods delivered by common carrier would be constitutionally proper. In *Nelson v. Sears, Roebuck and Co.*, 312 U. S. 359, and *Nelson v. Montgomery Ward and Co., Inc.*, 312 U. S. 373, the right to require collection of use tax was upheld with respect to goods mailed or shipped by common carrier from without the State, on unsolicited orders sent by the purchasers to a place of business of the vendor located in another State. The vendor conducted other business within the State, namely, the maintenance of retail outlets, and it was held proper to combine the mail order business with the other business over which the State clearly had control to determine the total amount of business conducted within the State. In this case, the business conducted in this State through delivery in vehicles owned by Appellant clearly is within the State's control. Since this is so, under the *Sears, Roebuck* and *Montgomery Ward* cases, the State may place on such business subject to its control the additional requirement of collection of use taxes on the business in which delivery by common carrier takes place in Maryland. Furthermore, in the *Montgomery Ward* case, it was held that, independently of the retail outlets in the State, advertising activity by the vendor in the State justified requirement of tax collection with respect to goods sent by common carrier or mail from without the State.

With respect to goods for which delivery is accomplished by transfer at the Delaware place of business to the purchaser, we wish to disclaim any intent on our part to argue that the duty of use tax collection can be imposed where, at the time of purchase and delivery, it is not known to the vendor that the goods are purchased for use, storage

or consumption in the State of Maryland. Such a contention, we acknowledge, would run foul of the Constitution. Primarily, it would do so, however, on due process grounds. It would do so on commerce clause grounds only in the secondary sense that to infringe the due process clause in dealings with an instrumentality of interstate commerce is of itself to place a burden on interstate commerce. That the commerce clause would not be directly violated by a requirement of use tax collection even in the extreme case where the vendor did not know that the goods were destined for Maryland is indicated by the opinion in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, at pages 364 and 365, where it is suggested that, in the case of vendors conducting no activities in the State in which the purchasers reside, the inability of the State to require use tax collection springs not from commerce clause prohibition but from the impotence of the State to reach the vendor, the absence of anything on which the State could act. Cf. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, at page 444. In the present case, however, the deliveries which took place at Appellant's store in Wilmington, Delaware, all were ones as to which, in the State's understanding of the matter at least, there was knowledge on the part of the Appellant that the goods were to be used, consumed or stored in Maryland. We believe that the Agreed Statement of Facts filed in this matter, properly read, reveals this fact. See paragraphs 4 and 5 thereof (R. 12). In any event, to the extent that it does not, we disclaim any case or controversy as to the duty to collect taxes on goods picked up by the purchasers in Wilmington where their destination was unknown to Appellant. We concede that the duty could not in such a situation constitutionally be required.

As for deliveries to the purchasers in Delaware where it was known to Appellant that the goods would be used, stored or consumed in Maryland, however, we submit that the rules developed in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373, sustain imposition of the tax collecting duty. In those cases, delivery was by mail or common carrier, presumably, in some instances at least, at the expense of the purchaser. In such cases, delivery equally took place outside the State. We suggest that the factor of importance is the knowledge of the vendor that the goods were destined for use in a State which, by reason of other sales by the vendor, had sufficient contacts to require tax collection.

Thus, it can be seen that in no circumstances does the onus of tax collection here imposed on Appellant assume the proportions of a burden on interstate commerce. It should be mentioned that there is nothing inconsistent with the cases cited by us to be found in *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327. That case concerned a vendor whose activities in the State which required tax collection were identical with those of the vendor in the companion case of *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335. This Court held that collection of the tax concerned was improperly demanded, but only on the grounds that the tax itself was bad, not that the pressing of the vendor into service as a collector was unconstitutional. The tax involved was a sales tax, and it was held that there was no local, non-interstate aspect of the sale within the taxing state. Hence, the tax was bad under the principles of the well established line of cases culminating in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602. In the present case, as in *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335, the tax involved is a use

tax, which Appellant acknowledges the State of Maryland may properly levy with respect to the goods here involved. As in the *General Trading Co.* case, therefore, the demand that Appellant collect the tax is constitutionally proper.

It may be said of *McLeod v. J. E. Dilworth Co., supra,* that the Court regarded the incident of tax, the sale, as outside the State's jurisdiction. At 322 U. S., page 330, it is said:

> "* * * in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale — the transfer of ownership — was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

Thus, it may be supposed that, while *McLeod v. J. E. Dilworth Co.,* 322 U. S. 327, was decided under the commerce clause, it primarily is a due process case, blood brother to such cases as *Frick v. Pennsylvania,* 268 U. S. 473, and *Treichler v. Wisconsin,* 338 U. S. 251, which strike down taxes levied against transfers of property not situated in the taxing State, on the ground that their levying violates the due process clause. Since use of the goods here concerned is what is taxed, and since that use clearly occurs in Maryland, the case of *McLeod v. J. E. Dilworth Co.,* 322 U. S. 327, is of little relevance.

II.

The Requirement that Appellant Collect Use Tax for the State of Maryland in no way Violates the Due Process Clause of the Fourteenth Amendment to the Constitution.

Since the decision of *International Shoe Co. v. Washington,* 326 U. S. 310, it is manifest that, without violation of the due process clause, a State may let the impact of its

laws be felt by anyone who conducts activities within the State which are reasonably related to the laws involved. The fact that a corporation such as Appellant, is not "doing business", in the traditional sense, does not render it immune from State regulation of such activities as it does conduct within a State's borders. Here, we are concerned with activities of Appellant designed to enter and tap the market created under, protected by, and existing because of the laws of the State of Maryland. The obligation here enforced against Appellant grows out of and is solely concerned with such activities. The contacts of Appellant with the State, therefore, bear an intimate relation to the duty imposed upon it. The decision in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, that delivery at the end of an interstate movement is an item local in character fully establishes that, from a due process point of view, the State is justified in using such delivery as a fulcrum in establishing obligations under its laws. As to the very goods delivered in Maryland, in Appellant's vehicles or in common carrier paid by Appellant, that the Maryland Use Tax Act, in its application to Appellant, satisfied the requirements of due process seems evident.

As for those cases where delivery took place outside of Maryland, again we concede the State's inability to require collection of the tax unless the vendor knew that Maryland was the destination of the goods. In cases where the vendor did know, however, the necessary contact with Maryland need not be identified by looking at the individual transactions themselves alone. As it is sometimes the case in mathematics that problems cannot be solved by partial differentiation merely, but will yield only to integration, so here one must look at the overall business contacts of Appellant with the State of Maryland. When that is done,

it is evident that the delivery and advertising activities in Maryland are sufficient contact to make it fair and reasonable to require collection of the use tax not only on the goods delivered in Maryland but also those delivered in Delaware when it was known to Appellant that they would be taken to Maryland. It was this very approach which was employed by this Court in the cases of *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373; and *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335, to sustain a requirement of use tax collection on goods delivered by the vendor at a point beyond the borders of the State.

CONCLUSION

Having discussed the legal authorities which bear on the question presented, in conclusion we should like to call this Honorable Court's attention to one factor which falls more into the field of consequences of decision and thus focuses on what will come after, rather than what has gone before, this case. Should Appellant prevail in its contentions, it, in Wilmington, will be able to sell a table, advertised by it as costing $99.95, to a Maryland purchaser for an immediate cash outlay by the purchaser of $99.95. An identical table manufactured in the same place and advertised for the same price of $99.95 by a Maryland vendor in Elkton, Maryland, twenty miles away, can be acquired by the purchaser only upon an immediate cash outlay of $101.95 ($99.95 plus sales tax of two percent). Of course, in theory, the Maryland purchaser from Appellant is liable to pay two percent in taxes to the State. In practice, however, it can be said that most, if not all, such tax obligations are ignored. Only through collection by the vendor at time of sale can sales and use taxes be efficiently administered. Appellant, in its brief, makes much of the sup-

posed inconvenience to it of collecting taxes on goods sold to Maryland residents. However, for that inconvenience the State of Maryland will adequately compensate Appellant by permitting retention of three percent of collections. Although its Brief is silent on the point, what Appellant really hopes to preserve is the obvious competitive advantage *in the Maryland market* over Maryland merchants who must, through their general tax burden, primarily provide the funds through which the State in its police power makes possible that very market. That competitive advantage derives solely from tax evasion. Of course, we do not mean to imply that Appellant in any way encourages such tax evasion by Maryland purchasers. Appellant need not do so, for the evasion is prevalent enough without encouragement. However, Appellant is well aware of its existence and is anxious for its continuance. We strongly urge this Honorable Court that the commerce clause of the Constitution did not have as a purpose the encouragement of tax evasion. As the statute of frauds is not permitted itself to be the vehicle of frauds, so too, we suggest, tax evasion, the continuance of which is really Appellant's purpose, should not be countenanced in the name of encouragement of interstate commerce. The tax involved is legally due and payable although the property is transported in interstate commerce. It will not adversely affect interstate commerce for Appellant to collect that tax. It will prevent evasion for Appellant to do so. As was said in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 at p. 366, Appellant

> "is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa (Maryland) residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid."

We believe, therefore, that the superiority of the result we argue for over the result which Appellant seeks is manifest and that, therefore, even in the absence of the clear authorities supporting our position, ours is the correct position and the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

Edward D. E. Rollins,
Attorney General,

J. Edgar Harvey,
Deputy Attorney General,

Francis D. Murnaghan, Jr.,
Asst. Attorney General,

Attorneys for Appellee,
1201 Mathieson Building,
Baltimore 2, Maryland.